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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

WILLIAM SEAY, Plaintiff and Appellant, v. MARIA FERRANTE, Defendant and Respondent.	G040346 (Super. Ct. No. A247421) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Marjorie Laird Carter, Judge. Affirmed.

Dongell Lawrence Finney, John A. Lawrence, Shirin R. Kiaei, Christopher R. Pantel and Shaune B. Arnold, for Plaintiff and Appellant.

Hart, King & Coldren, William R. Hart and Irene L. Kiet, for Defendant and Respondent.

William Seay appeals from a judgment order of the probate court that dismissed his creditor's petition to enforce a money judgment against the settlor and life beneficiary of a trust, Robert Ferrante (Ferrante), by selling the corpus of the trust (a residence). The petition was dismissed on the motion of Maria Ferrante, guardian for minors who are the remainder beneficiaries of the trust. Seay argues the petition was sufficient to allow the residence to be sold. Maria Ferrante moves to dismiss the appeal on the ground there was no appealable order. We deny the motion to dismiss and affirm the judgment.

FACTS

The 2008 petition named as defendants Ferrante and the then-trustee of the subject trust (who is not a party to this appeal). It alleged Ferrante was the settlor, beneficiary, and initial trustee of the 518 Harbor Island Drive Trust (trust), created in 1994, to which Ferrante conveyed title to a residence in Newport Beach. Since that time, Ferrante has resigned as trustee in favor of a series of other individuals.[1] It alleged Ferrante retained a power to revoke the trust and the trust was a sham designed to avoid creditors. Facts said to show this included Ferrante's subsequent division of title to the residence among the trust and five others, creating bogus liens on the residence, placement of all his other assets in various trusts, and reliance upon the income from other trusts for support.

In 2004, Seay obtained a money judgment against Ferrante for $2,461,057.16 and recorded an abstract in Orange County. The petition alleged the judgment was enforceable against the residence because Ferrante was a beneficiary of the trust, he retained a power of revocation, and the trust was designed to shield assets from

[1] The petition alleged Seay had been one of the successor trustees, although he was not trustee at the time the petition was filed. Seay agreed to act as trustee as a favor to Ferrante and subsequently loaned money to Ferrante. When Ferrante failed to repay the loan, Seay obtained the judgment in issue.

creditors. The only relief sought was an order declaring the trust invalid and directing sale of the residence to satisfy the judgment.

The trust document is attached to the petition. A review of its provisions reveals the following. The trust reserved to Ferrante the right to use the residence and all trust income for twenty years, made a gift over to his three minor children of "a vested remainder in the trust assets," and purported to leave in Ferrante a "contingent reversionary interest." (Paragraph I (B)(1).) Paragraph II ("Irrevocability") states: "This trust [is] irrevocable, and the [g]rantor has no power to alter, amend, revoke, or terminate any trust provision or interest . . . ." Paragraph III (A) ("Grantor's Retained Interest") provides Ferrante may use the residence without paying rent or other charges and it is to be maintained from the trust's funds. The trustee may rent the property with Ferrante's consent. (Paragraph III (A)(1)). But "[t]he trustee may distribute neither income nor corpus to anyone other than [Ferrante] before the termination of the trust." (Paragraph III (A)(2).)

Maria Ferrante moved to dismiss the petition as "a third party in interest," describing herself as the mother and legal guardian of the minors who were the remainder beneficiaries of the trust. She argued Seay lacked standing to invalidate the trust because he was neither a trustee nor a beneficiary of the trust.

At a hearing on the petition, the trial judge initially asked whether the judgment creditor applying for relief was creditor of a beneficiary of a trust. Counsel for Maria Ferrante jumped in with a long response that did not answer the question, and by the time Seay's counsel got to respond, the question was lost and never answered directly. Seay's counsel eventually said he was a judgment creditor, without being clear the debtor (Ferrante) was a trust beneficiary. Eventually, the judge said "whatever the true story is, and I'm not sure we're getting anywhere near all of it, what I have before me is a motion to dismiss. [¶] . . . [¶] And that motion is granted." Judgment was entered accordingly.

I

Maria Ferrante moves to dismiss the appeal on the theory the order is not appealable as the making or denial of an order "[d]irecting or allowing payment of a debt" (Prob. Code, § 1300, subd. (d)), the provision relied on in Seay's opening brief. She argues the cited provision applies only to an order directing a trustee to pay a debt, not the order here sought to direct the trustee to sell the residence. Seay responds he meant to cite another provision, one that permits appeal from the making or denial of an order "[d]irecting . . . the sale . . .of property." (Prob. Code, § 1300, subd (a).) He filed a notice of errata correcting his brief accordingly.

There is no question the order is appealable as denying a request to order the sale of property, so the motion to dismiss must be denied. We are not prepared to penalize Seay for either an inadvertent error, as he claims, or sloppy work in preparing the opening brief. In the interests of justice we shall resolve the appeal on the merits.

Maria Ferrante urges us to strike the notice of errata, relying on cases that refuse to consider an argument first raised in a reply brief, or on petition for rehearing, unless accompanied by explanation for the delay. (See, e.g., *Singh v. Lipworth* (2005) 132 Cal.App.4th 40, 43, fn. 2.) But here an explanation was offered, we accept it, no prejudice can be shown and so we turn to the parties' substantive arguments.

II

We briefly address the standard of review. Seay argues de novo review applies, since the question is one of deciding the meaning of various statues. Maria Ferrante counters we should review for abuse of discretion in denying the petition. She contends there is no issue of law because the order appealed from "does not arise from any one particular statute" and no statute authorizes a judgment creditor to petition to invalidate a trust. She insists the question is whether the trial judge exceeded her discretionary power to dismiss a petition "not reasonably necessary" to protect the interests of a trustee or beneficiary (Prob. Code, § 17202), or to make "orders . . . to

dispose of the matters presented by the petition . . . ." (Prob. Code, § 17206.) Seay is correct.

Review is de novo since only questions of law are raised. We are called upon to interpret the statutory provisions for enforcing a money judgment against a judgment debtor who is the settlor and beneficiary of a trust, and to determine if the statutes permit a judgment creditor to set aside his debtor's trust. These are questions of law that we review de novo. (See, e.g., *Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1687.)

III

Seay argues the petition was wrongly dismissed because he has standing as a judgment creditor to reach a debtor's interest as beneficiary of a trust. (Code Civ. Proc., § 709.010 subd (b).) He also asserts the irrevocability clause of the trust is a spendthrift provision that is invalid against creditors (Prob. Code, § 15304, subd. (a)), so he was entitled to have the residence sold. We disagree.

A money judgment may be enforced against an interest in a trust (Code Civ. Proc., § 695.030, subd. (b)(1)), but a beneficiary's interest is not subject to execution. (Code Civ. Proc., § 699.720, subd. (a)(8).) Rather, the proper method of enforcement is by petition for an order directing sale of the beneficiary's interest in the trust. "The judgment debtor's interest as a beneficiary of a trust is subject to enforcement of a money judgment only upon petition under this section by a judgment creditor to a court having jurisdiction over administration of the trust . . . . The judgment debtor's interest in the trust may be applied to the satisfaction of the money judgment by such means as the court, in its discretion, determines are proper, including but not limited to imposition of a lien on or sale of the judgment debtor's interest, collection of trust income, and liquidation and transfer of trust property by the trustee." (Code Civ. Proc., § 709.010, subd. (b).) This right is subject to provisions set out in Probate Code sections 15300 et seq. (*Id.*, § 709.010, subd. (c).)

One of those limitations provides that a spendthrift clause is not valid against creditors of the settlor of a self-settled trust: "If the settlor is a beneficiary of a trust created by the settlor and the settlor's interest is subject to a provision restraining the voluntary or involuntary transfer of the settlor's interest, the restraint is invalid against transferees or creditors of the settlor. The invalidity of the restraint on transfer does not affect the validity of the trust." (Prob. Code, § 15304, subd. (a).)

A creditor has more leeway where the debtor has created a revocable trust. "If the settlor retains the power to revoke the trust in whole or in part, the trust property is subject to the claims of creditors of the settlor to the extent of the power of revocation during the lifetime of the settlor." (Prob. Code, § 18200.) But whether the trust is revocable turns on the four corners of the instrument: "The California cases . . . have looked to the express terms of the trust instrument in determining whether a trust is revocable" and "a settlor's conduct after an irrevocable trust has been established will not alter the nature of such a trust." (*Laycock v. Hammer* (2006) 141 Cal.App.4th 25, 30, 31.)

A

Here, Seay did not seek to reach Ferrante's interest as *beneficiary* of the trust, but instead petitioned only to declare the trust invalid and have its assets sold as the property of Seay. Such action is not authorized by Code of Civil Procedure section 709.010, subdivision (b), set out above.

Seay might have requested a sale of Ferrante's interest as life tenant and holder of a reversion in the residence, but no such relief was sought. To the contrary, the only relief requested in the petition was the aforementioned sale of the residence. On appeal, Seay seeks to save the petition by now asserting he was entitled to reach Ferrante's interest as beneficiary of the trust, but a pleading cannot be amended on appeal to create a claim where none was pleaded. So the petition cannot be saved under Code of Civil Procedure section 709.010, subdivision (b).

B

Nor was Seay entitled to reach the residence on the theory the irrevocability clause was spendthrift provision invalid against creditors under Probate Code section 15304, subdivision (a).[2] The irrevocability clause is not a spendthrift provision. A spendthrift provision is "a provision restraining the voluntary or involuntary transfer of the settlors' interest" in the trust. (*Ibid*.) The irrevocability clause, found in Paragraph II ("Irrevocability") of the trust, provides "[t]his trust [is] irrevocable, and the [g]rantor has no power to alter, amend, revoke, or terminate any trust provision or interest . . . ." No authority is cited for the proposition California's spendthrift restriction applies to an irrevocability clause, nor does Seay offer any policy reason to support his position.[3] So Seay was not entitled to have trust assets sold to satisfy his judgment against Seay as settlor of a revocable trust.

There is another insurmountable problem with the argument the trust was revocable. It is the rule that a judgment creditor cannot show an irrevocable trust is actually revocable based on subsequent conduct of the settlor. *Laycock v. Hammer, supra*, 141 Cal.App.4th 25 is directly on point.

In *Laycock*, a judgment creditor sought to reach the assets of an irrevocable trust to satisfy a judgment against the settlor. It asserted the trust was revocable because the settlor had treated its assets as his own. The settlor had purchased a substantial life insurance policy and transferred it to an irrevocable life insurance trust, which provided the death benefit was to be paid to the trustee of the trust, his granddaughter. The creditor alleged the settlor subsequently treated the trust corpus as his own property by acting as a cotrustee when he was not, directed distributions of trust funds, and borrowed

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[2] Where a trust is revocable, trust property is subject to claims of creditors of the *settlor* made during the settlor's lifetime, to the extent of the power of revocation. (Prob. Code, § 18200.)

[3] Maria Ferrante asserts the argument based on Probate Code section 15304 was waived because that statute was not cited in the petition. We need not reach this point, since we hold that statute is unavailing to Seay. But we note the petition did allege the trust was revocable and Seay was entitled to reach its assets to satisfy his judgment against Ferrante (the settlor).

from the trust without objection from the beneficiary, who believed the settlor could act as he pleased with the corpus, since it was money he had earned. (*Laycock v. Hammer, supra,* 141 Cal.App.4th at p. 31.)

The court held "a settlor's conduct after an irrevocable trust has been established will not alter the nature of such a trust." (*Laycock v. Hammer, supra,* 141 Cal.App.4th at p. 31.) It explained the express terms of a trust determine whether it is irrevocable; an irrevocable trust may be set aside only by petition of all beneficiaries (or a showing of changed circumstances) (Prob. Code § 15403), and trust property is subject to creditors of the settlor only where the settlor retains a power to revoke. (Prob. Code, § 18200.) As the court put it, "by expressly giving settlors' creditors the right to reach only the assets of revocable trusts, the Legislature . . . has clearly indicated an intention that creditors are to be bound by the terms of an irrevocable trust to the same extent settlors, beneficiaries and other claimants are bound by such an instrument." (*Laycock v. Hammer, supra,* 141 Cal.App.4th at p. 31.)

Here, Seay makes an equally futile argument that Ferrante's actions show the trust was revocable. The petition alleged Ferrante retained a power to revoke because he: (1) subsequently transferred title to the residence among the trust and five others; (2) created bogus liens on the residence; (3) placed all of his other assets in various trusts; and (4) lived off income from the several trusts. But even if true, *Laycock* teaches none of these facts would be sufficient to show the trust was revocable.

Seay contends *Laycock* is not controlling on either the facts or the law. But the distinctions are not well taken. The fact argument is that *Laycock* involved a life insurance trust, and a creditor who sought to enforce its judgment against the settlor's estate. The latter misstates the case, since the creditor in *Laycock* went after *both* the trust and the deceased settlor's estate. But more to the point, Seay fails to explain why either difference should dissuade us from following *Laycock*, so the fact argument is waived. On the law, Seay argues he alleged the instant trust was revocable on additional

grounds not considered in *Laycock*, namely, that the irrevocability clause was void against creditors as a spendthrift provision. But the spendthrift argument is without merit, as we have explained, and it does not avoid *Laycock.*

Since Seay's petition did not seek to enforce his judgment against Ferrante's interest as beneficiary of a trust, the trust was not revocable so as to permit a creditor to reach trust assets, and a creditor cannot use the settlor's conduct to show a irrevocable trust is actually revocable, the petition failed to state any basis to enforce Seay's money judgment against the trust or trust assets. The petition was properly dismissed, and the judgment appealed from is affirmed. Maria Ferrante is entitled to costs on appeal.[4]

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.

[4] In light of our holding the petition failed to state any basis for relief, we need not reach Maria Ferrante's arguments Seay lacked standing under the Probate Code to invalidate the trust, and Ferrante is not a beneficiary of the trust. But we must note the latter is, to be generous, an odd assertion since the trust provides "[d]uring the trust's term, the [t]rustee shall hold the [r]esidence for the exclusive personal use and benefit of the [g]rantor," who was Ferrante.